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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 213

JOSEPH LAWRENCE MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 149–150; Pet. 17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1956 (R. 151; Pet. 18–19). The petition for a writ of certiorari was filed on June 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the admission in evidence of hearsay testimony, showing petitioner's complicity in narcotics transactions other than those charged, constituted

prejudicial error where such testimony was evoked by petitioner's opening up of the subject of his reputation in cross-examining a government agent.

2. Whether the trial court's admission in evidence of narcotics transactions by persons other than petitioner constituted prejudicial error where such evidence tended to prove the conspiracy charged.

3. Whether there was sufficient evidence to support petitioner's conviction of conspiracy.

STATEMENT

After a jury trial on an indictment in four counts, petitioner was found guilty under counts two and four, which charged him with a sale of heroin on October 1, 1954, in violation of 21 U. S. C. 174, and with conspiring with others to sell narcotics.[1] He was sentenced to serve concurrent terms of imprisonment of three years each on counts two and four, and in addition was fined $1.00 on count two, the payment of which was remitted (R. 122–123). The Court of Appeals affirmed *per curiam* (R. 151; Pet. 16–17).

The evidence adduced by the government may be summarized as follows:

About 10:00 A. M. on July 17, 1954, special government employee Jenkins went with federal narcotics agent Crouch to the Red Rose Cafe in New Rochelle, New York. On entering, Jenkins asked the bartender if petitioner was there. The bartender replied that he was not but that he had left word for Jenkins to stand by the jukebox. After a while petitioner enter-

[1] He was acquitted on two counts charging illegal sales on July 17 and October 22, 1954.

ed the cafe and greeted Jenkins. (R. 5–6, 125).) Jenkins returned to Crouch who had been sitting at the bar and told him what had happened (R. 6, 20). A woman then walked up to them and handed Crouch a package, saying (R. 6, 32) "Joey sent you this package". Crouch asked her how much they owed her, and when she replied $510, he paid her that amount. (R. 6–7, 9, 32). When the woman left, the two men went to the men's room and opened the package, which they found to contain an envelope of white powder (R. 9). Upon analysis, the powder was found to contain heroin hydrochloride (R. 58–59).

Jenkins returned to the Red Rose Cafe on September 29, 1954, where he again talked with petitioner, telling him that he, Jenkins, expected a man from out of town for whom he would like to purchase some heroin. Petitioner replied that he had about 8 ounces of heroin on hand. He said he would sell it for $130 an ounce if the man would be interested, and, if so, to return on October 1st. (R. 10.)

On October 1, 1954, Jenkins and Crouch went back to the cafe and talked with petitioner, who was tending bar (R. 11, 22, 23, 26). Jenkins told petitioner that the last supply of "stuff" was of insufficient quantity and inferior, and asked him to explain the reason for this to Crouch, whom he introduced as his "man" (R. 11, 27, 32). Petitioner replied that the heroin was all right when it left his hands (R. 11, 33). The two men ordered 5 ounces from petitioner, who told them to wait five minutes and then left (R. 11). On his return, he told them they could pick up the order in the first telephone booth, but he asked

first to be paid. When they insisted on seeing what they were getting before paying, he told them to get it, look at it in the men's room, and if they approved, shake hands with him on the way out and in that way pass him the money. (R. 11–12.) Crouch went into the booth, picked up the package from the floor, and, with Jenkins, went to the men's room where they found the package to contain an envelope of white powder (R. 12–13), which again proved to be heroin hydrochloride. (R. 58–59.) On the way out of the cafe with Crouch, Jenkins passed petitioner $650 as he was shaking hands with him (R. 13, 33).

On October 22, 1954, Jenkins returned to the cafe about 11 o'clock in the evening and ordered another 5 ounces from petitioner, who told him he would have to wait until 11:45 before he could be served. At the appointed time, Jenkins entered an entertainment room in the rear of the cafe, where he was greeted by a man whom he did not know and who said, "I understand that you want to do some business". (R. 13.) Jenkins replied, "yes", and the man ushered Jenkins to a table, where they were met by a second man (R. 13–14). The first man handed Jenkins the package, and said (R. 14), "Here are your five ounces. You give me $650." After looking at the heroin, Jenkins paid over the money and left the cafe (R. 14, 15).

ARGUMENT

1. During the cross examination of narcotics agent Rudden, defense counsel went into considerable detail questioning him about his investigation of petitioner: how extensive was the investigation, did it cover

investigation of the criminal records of petitioner and his family, what was petitioner's reputation, and the like. Rudden's response to all these questions was that the investigation revealed nothing detrimental to petitioner (R. 136–138). Thereafter, the following occurred (R. 50–51, 139):

> Q. Now you spoke to all of these drug addicts for the purpose of ascertaining if Joe Marino ever sold narcotics, isn't that right, or dealt in narcotics? A. It was not the only purpose, sir.
>
> Q. That was the real purpose, wasn't it? A. Not particularly, sir.
>
> Q. Well, was it one of the purposes? A. Yes, sir.
>
> Q. Now, did any of you—I don't know who you spoke with—did any of them say the defendant dealt in narcotics? A. No, sir.
>
> * * * * *
>
> Q. There was not an outside source that you investigated that you spoke with to try to find out something about Marino who said that Marino was implicated or dealing in narcotics; is that correct? A. What do you mean by outside, sir? You mean other than the law enforcement officers that were working on this case and any other people that were assisting us?
>
> Q. Yes. A. My answer is no, then, sir.
>
> Q. It is "No"? A. Yes, sir.

When Rudden resumed the witness stand after a recess he said (R. 52):

> The Witness: Your Honor, if I may, I would like to make a correction on my testimony of yesterday, insofar as the question that was put

> to me by attorney Falk [defense counsel]. The question, I believe, was did I know from any outside source or did I hear from any outside source if Joe Marino was dealing in narcotics. I would like to change the answer from "no" to "yes".

Defense counsel did not pursue the subject any further at that time. However, on Rudden's redirect examination, the following occurred (R. 56):

> Q. Agent Rudden, do you recall Mr. Falk asking you yesterday whether or not any outside sources had ever told you anything that in any way involved the defendant in this case with narcotics and you recall your answer yesterday afternoon was "No"? A. Yes, sir.
>
> Q. This morning you came into court and said you wished to change that answer to "Yes"? A. That is correct, sir.
>
> Q. Will you tell us what you have heard that in any way connected this defendant with narcotics?
>
> Mr. Falk. *Go ahead.* [Emphasis added.]

Rudden then testified, without objection, that he had been informed by a special agent of the Bureau of Narcotics, one Irene Insull, that she had negotiated a heroin "buy" with petitioner, and that he had also been told of another instance when petitioner had used government witness Jenkins to make a purchase of cocaine (R. 56, 142). He also testified that Jenkins told him that bartender Walter had told him [Jenkins] "that there was something involving narcotics as far as Ann Chieco [petitioner's sister who owned the cafe] and Joseph Marino were concerned, but

Walter stated that if it were something it had to be big" (R. 144).

On recross examination, defense counsel pursued the line of inquiry about Jenkins' conversation with bartender Walter (R. 57–58). Later, when the judge observed that some of the foregoing testimony was triple hearsay, and noted the fact that defense counsel had in the first instance "opened the door" to this line of questioning and that is why it "went in", defense counsel agreed to this observation (R. 146). Subsequently, petitioner took the stand in his own defense and testified as to his good reputation and character (R. 82–86).

Petitioner attributes (Pet. 7–8) reversible error to the trial court's admission in evidence of agent Rudden's hearsay testimony as to the defendant's reputation for dealing in narcotics. But it is clear from the portions of the record which we have quoted and cited that a good part of Rudden's cross examination by defense counsel was directed to showing that the extensive investigation which was made by the government concerning petitioner's life and reputation failed to produce any derogatory information about him. Defense counsel had announced in his opening statement that this would be his line of defense; he told the jury that he was going to prove that petitioner had never associated with drug peddlers and that no one had ever heard of petitioner "dealing in narcotics" (R. 124). Counsel's closing statement was along the same line (R. 148). Once petitioner opened this line of inquiry—expressly asking for hearsay as to his reputation, associations, dealings, etc.—he could

not prevent the government from exploring the same line; and it is clear from the record that the hearsay the government was permitted to elicit, without objection, did not go beyond counteracting this tactic of the defense.

As this Court stated in *Michelson* v. *United States,* 335 U. S. 469, 479, "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Since petitioner's defense had broadly portrayed him as having a reputation as an honest and law-abiding citizen, basic fairness dictated that the prosecution should be permitted to meet this strategy by adducing the same type of hearsay defense counsel had invited by his own cross examination. See also *Walder* v. *United States,* 347 U. S. 62; *United States* v. *Rossi,* 219 F. 2d 612 (C. A. 2), certiorari denied, 349 U. S. 938; *United States* v. *Pagano,* 224 F. 2d 682 (C. A. 2), certiorari denied, 350 U. S. 884.[2]

[2] Petitioner's contention (Pet. 2, 7) that the court below has adopted the rule of the recent *Costello* case, 350 U. S. 359, for the trial of criminal cases is absurd.

Equally unworthy are his observations (Pet. 12–14) concerning the defense of persons charged with crime in the City of New York and his charge that, because of indigence, "90% of all defendants in criminal trials have only token counsel to comply with constitutional requirements" (Pet. 13), which he couples with an insinuation that trial counsel, Mr. Falk, was derelict in his duty in the line of defense he adopted and that the trial judge was equally derelict in not stopping Mr. Falk. Mr. Falk apparently was retained by petitioner. He said in his summation before the jury (R. 148): "I set about trying this case in the most unorthodox manner of my whole career. * * * And suffice it to say that my recol-

2. In examining its witness Jenkins on direct examination, the government questioned him about the narcotics transactions which he had at the cafe with persons other than petitioner. Petitioner did not object at that time, but now contends (Pet. 11–12) that the admission of such evidence constituted prejudicial error. But the evidence as a whole shows that petitioner was involved in those transactions, and the testimony was therefore directly pertinent to the conspiracy count. It tended to show that petitioner's activities were not isolated transactions but were part of a large narcotics operation involving other participants at the cafe. See the Statement, *supra,* pp. 3–4.

3. Finally, petitioner contends (Pet. 14–15) that there was insufficient evidence to support his conviction of conspiracy, principally because he was acquitted on the only substantive count which charged that he acted jointly with another person. But his conviction on one of the substantive counts, which he does not challenge for insufficiency of the evidence, supports the concurrent sentences of three years which were imposed on it and the conspiracy count. *Hira-*

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lection of the courts goes back 47 years. * * * I wanted him to take that stand and I wanted you to know what his life has been, and then I felt that you could judge for yourselves if the defendant was the type of young man who would consciously, willingly and knowingly lend himself to the transactions of which he has been accused." The government's brief in the Court of Appeals informs us that Mr. Falk is "an able and experienced trial lawyer who has conducted an active trial practice in the courts of this State for almost forty years." Present counsel's hindsight and his notions of what the defense strategy should have been hardly furnish a proper basis for his charges of woeful incompetence of trial counsel and denial of due process by the trial judge.

bayashi v. *United States*, 320 U. S. 81, 85; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642, fn. 1. In any event, our summary of the evidence (*supra*, p. 2–4) shows that there were other participants in some of the transactions at the cafe. Petitioner's acquittal on the counts involving those transactions did not preclude consideration of the evidence concerning them in deciding his guilt under the conspiracy count. As the court below pointed out (Pet. 17), consistency in a jury's verdict is not required.[3]

[3] Petitioner's assertion (Pet. 3) that the trial court erred in admitting in evidence the criminal record of petitioner's brother-in-law is without substance. Such evidence was elicited from agent Rudden by defense counsel on cross examination (see R. 48–49, 52–53, 140–141). Petitioner's further complaint (Pet. 3) that evidence tending to show that "criminals" frequented the Red Rose Cafe was erroneously admitted apparently refers to the prosecutor's cross examination of Murray Howell, the manager of the cafe (R. 66). But Howell had testified on direct examination that only "nice people" visited the cafe; and the prosecutor's interrogation as to whether certain named persons frequented the place (R. 72–75) was legitimate cross examination on this phase of Howell's testimony. Petitioner cites no supporting record reference for his charge that the prosecutor introduced evidence that "petitioner's sister may have had an affair with a colored man" (Pet. 3). She was a witness for the defense (R. 77) and on cross examination she was questioned about her relations with Howell (R. 80–82), who preceded her as a defense witness (R. 67). Apparently, petitioner has reference to this cross examination, although it does not appear that Howell is a Negro. The full text of the sister's and Howell's direct examination is not reproduced in the record and it is difficult to ascertain the relationship of the cross examination to matters brought out by the defense as part of its case. In any event, there was no objection to this line of cross examination and it did not show an "affair".

CONCLUSION

The petition for a writ of certiorari presents no question meriting further review by this Court. It should be denied.

Respectfully submitted.

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